MOHD RAZALY RAHMAD v. PP

HIGH COURT MALAYA, SHAH ALAM
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL APPEAL NO: 42S-232-11-2013]
7 OCTOBER 2014

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused person convicted for gang robbery at convenience store – Sentenced to four years imprisonment and one stroke of rotan by Sessions Court – Robbers came in store wearing helmets with visors and fled scene when police arrived – Accused person caught by member of public while two others remained at large – Employees of stores identified accused person through identification parade – Conviction made based on evidence of identification – Whether prosecution proved case beyond reasonable doubt – Whether conviction and sentence safe – Penal Code, ss. 395 & 397*

EVIDENCE: *Identification evidence – Identification parade – Accused person appealed against conviction and sentence for offence of gang robbery – Penal Code, ss. 395 & 397 – Appeal against decision of Sessions Court – Robbers robbed convenience store wearing helmets with visors and fled scene when police arrived – Accused person caught and identified by employees of convenience store as one of the robbers – Sessions Court convicted accused person based on identification by employees – Whether employees had clear view of robbers since they were wearing helmets with visors – Whether identification made in ideal circumstances – Whether prima facie case established – Turnbull guidelines – Whether conviction and sentence safe*

In the Sessions Court, the appellant was charged for gang robbery, an offence under s. 395 read together with s. 397 of the Penal Code. The prosecution's witnesses, PW1 and PW2, were employees of a Seven Eleven outlet ('the store'). On the fateful day, PW1 was stationed at the cashier's counter while PW2 was at the back when a person wearing a helmet with a visor entered the store, went behind the counter holding a knife and demanded PW1 to take out the money at the counter. At the same time, two other accomplices entered the store and one of them proceeded to the back. According to PW2, there was a CCTV at the back of the store. Having witnessed the drama that transpired at the front *via* the CCTV, PW2 had the opportunity to call the police before he was taken to the front of the store by an accomplice who was said to have sported a helmet with 'rainbow' visor. Shortly after that, the police arrived but the robbers fled the scene, taking with them cigarettes and money. The appellant was arrested by a member of the public and was handed to the police while his accomplices remained at large. PW1 and PW2 were able to identify the appellant at the identification parade. However, the Sessions Court Judge ('SCJ') concluded that PW1 was unable to see the appellant as his identification was based on the size of the participants and that he had only guessed the robber's identity.

In arriving to the conclusion that the appellant was clearly identified as one of the robbers, the SCJ relied on PW2's testimony who gave evidence that he was able to see the appellant's face because the helmet worn had apparently prevented light shining from above from reflecting off the surface of the visor and into his eyes. Satisfied that the prosecution had made out a *prima facie* case, the appellant was called to enter his defence. At the end of the trial, the SCJ found the appellant guilty and sentenced him to four years imprisonment and one stroke of the rotan. Hence, the present appeal by the appellant against his conviction and sentence. The issue that arose for the court's determination was whether, in all the circumstances of the case, the identification of the appellant was safe.

Held (allowing appeal; setting aside conviction and sentence):

(1) Apart from the reference to the testimony of PW2 as to why he was clear and certain of his identification of the appellant as one of the robbers, the judgment failed to address the issue of the conditions under which such identification was made. There was also certainly absent from consideration, the issue of whether the quality of identification was such as to necessitate a warning given to itself of the dangers of acting on such evidence. (para 22)

(2) From the nature of the identification evidence given by PW2, it was clear that his identification was not made in the ideal of circumstances. The surface of the 'rainbow' visor would necessarily reflect a certain amount of light of its surface and the tint being a rainbow tint, could only mean that there was a certain number of different colours reflecting off its surface. PW2 further testified that the role of the robber he identified as the appellant was only to usher him from the back of the store to the front. Given the ordinary course of events, this would have taken no more than a few seconds to achieve. Any reasonable inference would conclude that the opportunity for observation of the appellant would inherently be brief. (para 23)

(3) There was nowhere mentioned in the SCJ's judgment of the circumstances under which the identification was made, the length of time PW2 had the opportunity to observe the robber's face, the distance from which the observation was made and whether there were any impediments or obstruction to the view that PW2 had. Even though PW2 might have been certain of his observation of the appellant, it was incumbent upon the SCJ to evaluate the quality of the identification given the circumstances in which they were made, which the SCJ failed to do. This was more glaring in light of the fact that although PW1 was present at the scene, he was unable to positively identify the appellant. (paras 26 & 27)

(4) The SCJ had failed to warn herself of the dangers associated with accepting the identification evidence of PW2. This was so notwithstanding the fact that PW2 had identified the appellant in the identification parade held after the incident. The evidence of the identification parade, is at best, supporting evidence. Although it can be used to corroborate the substantive evidence given by the witness in court, it has no independent value. When the identification parade was conducted, the appellant was not wearing a helmet with a full face rainbow visor. The conditions were therefore less than ideal and not reflective of the actual circumstances under which PW2 had seen the robber in question. The quality of the identification evidence under the circumstances was inherently poor. (para 28)

(5) Given the poor quality of the identification evidence, should the SCJ have conducted a maximum evaluation of the prosecution's case as required, she ought to have held that the prosecution had failed to establish a *prima facie* case and so should have acquitted the appellant without calling upon him to enter his defence. (para 30)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Duis Akim & Ors v. PP [2013] 9 CLJ 692 FC ***(refd)***
Erivesto Anderson & Anor v. PP [2008] 6 CLJ 453 FC ***(refd)***
Heng Aik Ren Thomas v. Public Prosecutor [1998] 3 SLR 465 ***(refd)***
Jaafar Ali v. PP [1999] 1 CLJ 410 HC ***(refd)***
KS Roberts v. PP [1970] 1 LNS 44 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No. 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Tan Sri Kasitah Gaddam [2009] 1 LNS 741 HC ***(refd)***
R v. Turnbull [1976] 3 All ER 549 ***(refd)***
Yau Heng Fang v. PP [1985] 2 CLJ 22 SC ***(refd)***
Ye Wei Gen v. PP [1999] 4 SLR 101 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Penal Code, ss. 34, 395, 397

For the appellant - Nik Zarith; M/s Nik Zarith & Co
For the respondent - Faten Hadni; AG's Chambers

[Appeal from Session Court; Arrest Case No: S1 62J-53-10-2012]

Reported by Najib Tamby

A

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

B **[1]** The appellant was charged for an offence of gang robbery under s. 395 read together with s. 397 of the Penal Code at the Sessions Court at Ampang. At the end of the trial he was found guilty and sentenced to four years imprisonment and ordered to be whipped with one stroke of the rotan. The appellant is appealing against both the conviction and the sentence imposed on him.

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The Charge Against The Appellant

[2] The charge against the appellant as translated from Bahasa Malaysia read as follows:

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> That you together with 2 others still at large on 26.10.2012 at around 0240 hours, at the 7- Eleven store at Taman Permata, Ampang, in the district of Ampang Jaya in the state of Selangor Darul Ehsan, with common intention as defined in section 34 Penal Code, did commit robbery on one Shaiful Bahri bin Ahmad Musafar (NRIC:920520-14-59430) by robbing property belonging to his employer, to wit cash amounting to RM40.00, and 40 boxes of various cigarette brands, and you have thereby committed an offence punishable under section 395/397 Penal Code.

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Facts Of The Case

[3] The facts of the case as adduced by the prosecution disclose that on 26 October 2012 both prosecution witness no. 1 ("PW1") who was also the
F complainant and prosecution witness no. 2 ("PW2"), were working at the Seven Eleven outlet at Taman Permata, Ampang. PW1 was stationed at the cashier's counter while PW2 was at the back of the outlet at the said store. The doors to the outlet were kept locked at the time but they were opened if there were customers. At about 3.40am, a couple together with a child
G came by the store. As they came in, someone followed them wearing a helmet with a visor. PW1 was thus unable to see the person's face clearly. This person then said that this was a robbery and he told the couple not to 'berlawan' (resist) as the robbery did not involve them. This person then went behind the counter and took out a knife that was hidden in his socks
H and demanded that PW1 take out the money at the counter. At the same time, this person's accomplice came in and asked if there were any other workers there. PW1 then said that his colleague ("PW2") was at the back of the store. Upon hearing this one of them went to the back part of the store while the other remained in front and assisted the person who had first come into the store to remove both money and some goods from the shelves. They
I were soon joined by PW2.

[4] PW2 told the court that the back of the store where he worked, there was a closed circuit television ("CCTV"). Because of that, he had seen the entry of the two customers identified as the couple and also the three robbers. On witnessing the same, PW2 called the police and soon after that one of the robbers came up to him and asked him to go to the front of the store. This person wore a helmet with a 'rainbow' visor.

[5] While at the front of the store, PW2 was able to witness the robbers taking cigarettes and money belonging to the outlet. While engaged in their pursuit, the police arrived and as a result all the robbers fled the scene. Thereafter, both PW2 and PW1 continued with their work as by that time their superior had arrived to deal with the police. PW4 was a police attached to the IPD Ampang Jaya who testified that on the day in question, he was on beat rounds and was directed to the place where the offence took place. Upon his arrival, he found two motorcycles at the scene. Upon conducting some checks, he found that the vehicles were not stolen. He then took the motorcycles back to the police station where he lodged a report and handed over the motorcycles to the investigating officer, PW8.

[6] PW5 was the inspector who conducted identification parades and he testified that both PW1 and PW2 were able to identify the appellant at the identification parades. Both PW1 and PW2 also identified the appellant in court as one of the robbers that day. However, during the course of cross-examination, PW1's testimony on the identification was called into question and he admitted that he told the police earlier that he was unable to identify the robbers. He also admitted under cross-examination that his identification at the identification parade was only based on the size of the participants and that he had only guessed 'agak-agak' the identity of the robber at the identification parade.

[7] PW2 on the other hand, was able to identify the appellant as the robber who went to the back of the store in order to get him to come to the front. PW2 also testified that he had identified the appellant at an identification parade and denied that he was coached or shown photographs of the appellant beforehand. PW2 further testified that although it is true that a 'rainbow visor' such as the one worn by the appellant would prevent another person from seeing the wearer of the helmet, he testified that he was nevertheless able to identify the person who wore the helmet. He explained that he was able to see the face of the appellant even though normally a 'rainbow visor' will reflect light off its surface. However, he said in this case the helmet had blocked the light shining from above and because of that he was able to see the appellant's face. He further testified that he was able to see only a bit of the face.

[8] The appellant was arrested by a member of the public on 27 October 2012 and handed over to PW7 who then made an official arrest before handing him over to the investigating officer. PW6 was attached to the forensics laboratory at the audio-video analysis section of the police

department. PW6 was handed the recordings of the CCTV but was unable to see any image in the recordings as they were all corrupt. PW8 was the investigating officer of the case and he testified that pursuant to his investigation, neither of the motorcycles recovered belonged to the appellant.

[9] The learned Sessions Court Judge after hearing the evidence of the witnesses for the prosecution, called for the defence of the appellant. In doing so, the learned Sessions Court Judge in her grounds of judgment, *inter alia*, alluded to the fact that PW2 was an honest witness who did not manufacture or add on to the evidence. As an example, she said that PW2 testified that the appellant did not take any items from the store and that his role was merely to get him to come to the front of the store. She also said that PW2 admitted that he was unable to identify the other two accused. She further said that PW2 was confident of his identification of the appellant as one of the three robbers and this according to her, constituted concrete proof of the identity of the appellant. She accordingly held that the prosecution had made out a *prima facie* case and called for the appellant's defence.

[10] The appellant chose to give oral testimony on oath. The learned Sessions Court Judge, after considering the defence held it to be a bare denial. The appellant testified that he had never been to the store premises, had no knowledge of the robbery and had been arrested while he was hanging (lepak) around a housing estate. He was then remanded and subjected to an identification parade but said that he did not know the reason for all of these. He brought along his helmet to court and explained that with the visor, it was impossible for anyone to see his face. However, it was nowhere given in evidence whether the helmet was one with a 'rainbow visor'. The Sessions Court Judge held that the defence of the appellant had failed to raise any reasonable doubt in the prosecution's case and convicted and sentenced him accordingly.

Grounds Of Appeal

[11] The grounds of appeal raised by the appellant were as follows. Firstly, the identification by PW1 and PW2 were not safe. Secondly, there existed contradiction between the evidence of PW1 and PW2. Thirdly, there existed a contradiction between the oral and the documentary evidence. Another ground raised was that the testimonies of the witnesses for the prosecution was an afterthought especially with regard to the issue of identity. A further ground raised was the failure to invoke s. 114(g) of the Evidence Act 1950 for the non-calling of a witness. Yet another ground was the weaknesses in the police investigation and finally, that the defence was consistent and that it did not amount to a bare denial.

[12] Of the several grounds raised, this court finds that this appeal falls to be determined on only one ground and it is this. Whether in all the circumstances of the case, the identification of the appellant was safe?

The Law On Identification Evidence

[13] It is quite obvious from the facts that the case against the appellant depends wholly or substantially on the correctness of the identification of the appellant which the defence here has alleged to be mistaken. It is also not in dispute that the appellant was not previously known by the complainant, PW1, or PW2, so this is not a case of recognition but more one of identification of the appellant as being one of the persons who committed robbery on the day in question. As alluded to earlier, the evidence of PW1 was called into question in respect of the identification of the appellant and the learned Sessions Court Judge had also in her grounds of judgment come to the conclusion that PW1 was unable to see the face of the person who came into the store wearing a helmet complete with a visor. However, the learned Sessions Court Judge relied on the testimony of PW2 in arriving to the conclusion that the appellant was clearly identified as being one of the robbers.

The Turnbull Guidelines

[14] The facts of this case and the sole issue that arises for consideration falls squarely within the scope of the principles as enunciated in the case of *R v. Turnbull* [1976] 3 All ER 549.The principles enunciated in that case which have come over time to be known as the '*Turnbull* guidelines' have been systematically and consistently followed by the courts in this country for the longest time. Although decided almost some four decades ago they remain relevant in cases which depend wholly or substantially on identification evidence. To accord it the recognition it deserves, the guidelines in *Turnbull* merit repetition in their entirety and are as follows:

> First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
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> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the

A accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, B the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

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All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of D observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur.

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[15] Their Lordships of the Court of Appeal in England in *Turnbull* went on to say:

A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence F the verdict is either unsatisfactory or unsafe.

[16] The guidelines in *Turnbull* have been faithfully and consistently referred to by the courts in this country. One such case where the guidelines were comprehensively considered was the High Court decision in *Jaafar Ali v. PP* [1999] 1 CLJ 410; [1998] 4 MLJ 406 where it was held as follows:

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Pre-trial identification of suspected offenders are complemented by judicial guidelines concerning the appraisal of identification evidence at the trial itself (see Criminal Evidence (3rd Ed) by Andrews & Hirst at p. 336). These guidelines were enunciated by the Court of Appeal in *Turnbull* as a result of criticism of the existing law under which no specific H duty was imposed on judges to warn juries against the proven dangers of mistaken identification evidence (see *R v. Long* (1973) 57 Cr App Rep 871 (refd)). The *Turnbull* guidelines have been accepted in Canada (see *Mezzo v. R* (1986) 4 WWR 577 (refd)); in Australia (see *Kelleher v. R* (1974) 131 CLR 534 (refd)); and in Malaysia (see *Rangapula & Anor v. PP* [1982] 1 MLJ 91 (refd); *Dato Mokhtar bin Hashim & Anor v. PP* [1983] 2 MLJ 232 I (refd); *Yau Heng Fang v. PP* [1985] 2 MLJ 335 (refd); *Arumugam s/o*

Muthusamy v. PP [1998] 3 MLJ 73 (folld)). These guidelines, which appear in the judgment of Lord Widgery CJ in *Turnbull*, deal with four issues. In elaborating on these issues, I can do no better than reproduce the work of Andrews & Hirst from pp. 338-339 where the learned authors have admirably re-arranged certain paragraphs of the judgment to explain them. They are as follows:

(a) The need for the judge to warn the jury about the dangers of identification evidence

> First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence allege to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance upon the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning, and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made, ... (at pp. 551-552).

(b) need for him to direct the jury to examine various specific matters that may affect the strength or cogency of the evidence before them

> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy, they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases, if the accused asks to be given particulars of such description, the prosecution should supply them. Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence.
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> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger (at p. 552).

(c) The question of when a jury may properly be allowed by the judge to convict the accused even in the absence of other evidence supporting the crucial identification

In our judgment, when the quality [of identification] is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence, even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. Were the courts to adjudge otherwise, affronts to justice would frequently occur …

When in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification (at pp. 552, 553).

(d) The question of what other evidence may properly be regarded as capable of supporting an identification

This [supporting evidence] may be corroboration in the sense lawyers use the word, but it need not be so if its effect is to make the jury sure that there has been no mistake in the identification. For example, X sees the accused: he gets only a fleeting glance of the thief's face as he runs off, but he does see him entering a nearby house. Later he picks out the accused on an identity parade. If there was no more evidence than this, the poor quality of the identification would require the judge to withdraw the case from the jury: but this would not be so if there was evidence that the house into which the accused was alleged by X to have run was his father's. Another example of supporting evidence not amounting to corroboration in a technical sense is to be found in *R v. Long* (1973) 57 Cr App Rep 871. The accused, who was charged with robbery, had been identified by three witnesses in different places on different occasions, but each had only a momentary opportunity for observation. Immediately after the robbery, the accused had left his home and could not be found by the police. When later he was seen by them, he claimed to know who had done the robbery and offered to help to find the robbers. At his trial, he put forward an alibi which the jury rejected. It was an odd coincidence that the witnesses should have identified a man who had behaved in this way. In our judgment, odd coincidences can, if unexplained, be supporting evidence.

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting evidence of identification. If there is any evidence or circumstances which the jury might think was

supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything, and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence, they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself.

Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on, may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only where the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was (at pp. 553-554).

A brief comment on the *Turnbull* guidelines may be of relevance. In *R v. Keane* (1977) 65 Cr App Rep 247, it was held that there was flexibility in the application of the guidelines. This was repeated by the Privy Council in *Nembhard v. The Queen* (1981) 74 Cr App Rep 144 (refd) in the following words:

Turnbull does not purport to change the law. It provides a most valuable analysis of the various circumstances which common sense suggests or experience has shown may affect the reliability of a witness's evidence of identification and make it too dangerous in some of the circumstances postulated to base a conviction on such evidence unless it is supported by other evidence that points to the defendant's guilt. *Turnbull* sets out what the judgment itself described as 'guidelines for trial judges' who are obliged to direct juries in such cases. But those guidelines are not intended as an elaborate specification to be adopted religiously on every occasion. A summing up, if it is to be helpful to the jury should be tailored to fit the facts of the particular case and not merely taken ready-made 'off the peg'.

However, it has been emphasized that where the primary issue is the identity of the accused, the principles set out in *Turnbull* must be followed (see *McShane v. Northumbria Chief Constable* (1980) 72 Cr App Rep 208 (refd); *R v. Hunjan* (1978) 68 Cr App Rep 99 (refd); *R v. Weeder* (1980) 71 Cr App Rep 228 (refd); *R v. Breslin* (1984) 80 Cr App

Rep 226). They apply to non-jury as well as jury trials (see *Grbic v. Pitkethly* (1992) 38 FCR 95 (refd); *Sharret v. Gill* (1993) 65 A Crim R 44 (refd); *Arumugam s/o Muthusamy v. PP* [1998] 3 MLJ 73). Thus they would apply in this case. Whatever the defence and however the case is conducted, where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed (see *Domican v. R* (1992) 173 CLR 555 (refd)). The terms of the warning need not follow any particular formula (see *R v. De-Cressac* (1985) 1 NSWLR 381 (refd); *Finn v. R* (1988) 34 A Crim R 425 (refd)). But it must be cogent and effective (see *R v. Dickson* [1983] 1 VR 227 (refd); *Reid (Junior) v. The Queen* [1990] 1 AC 363 (refd)). A warning in general terms is not sufficient (*Kelleher v. R* (1974) 131 CLR 534). The warning must be appropriate to the circumstances of the particular case (see *Smith v. The Queen* (1990) 64 ALJR 588). Failure to warn of the dangers of identity evidence may lead to the ordering of new trials or the quashing of convictions (see *R v. Preston* [1961] VR 761 (refd); *Domican v. R* (1992) 173 CLR 555; *R v. Keane* (1977) 65 Cr App R 247). On the sort of warning that must be given, useful reference may be made to *Domican v. R* (1992) 173 CLR 555 where the majority said at p. 565:

> The adequacy of a warning in an identification case must be evaluated in the context of the evidence in the case. But its adequacy is evaluated by reference to the identification evidence and not the other evidence in the case. The adequacy of the warning has to be evaluated by reference to the nature of the relationship between the witness and the person identified, the opportunity to observe the person subsequently identified, the length of time between the incident and the identification, and the nature and circumstances of the first identification - not by reference to other evidence which implicates the accused. A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused. The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence.

The quality of the identification evidence that is required includes a description of the accused that the identifying witness must have given to the police. The need for such description is implicit in *Turnbull* itself and has been stressed in cases such as *R v. Atfield* (1983) 25 Alta LR (2d) 97; *R v. Power* (1987) 67 Nfld & PEIR 272 (refd) and *PP v. Amar Singh* [1948-49] MLJ Supp 55 (refd). In my opinion, it is necessary for an identifying witness to give a description of the accused especially in cases where the accused was not known to the witness prior to the incident. It may not be necessary where there is other supporting evidence on the

identification of the accused and when the accused is well known to the witness. The object of a description of the accused is explained by Deutscher and Leonoff in in their book entitled *Identification Evidence* in the following words at pp. 111-112:

This preserves the original memory in as accurate a form as possible. The original description can then be cross-checked with the description given by other witnesses, with the actual appearance of the accused, and with the description given at trial. Variations between the original description and that given at trial may be as a result of the numerous psychological factors that tend to distort memory over time.

When the quality of the identification evidence is good as described in *Turnbull*, is sufficient even though there is no other evidence to support it provided that an adequate warning is given. When the quality is poor, as for example it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the accused shall be acquitted unless there is other evidence to support the correctness of the identification (see *R v. McDonald* (1951) 101 CCC 78). In the absence of such other evidence, the fact that the accused was picked out at an identification parade makes no difference to the order to be made.

There have been many cases of wrongful convictions based on mistaken eyewitness identification. It has been held that evidence as to identity based on personal impressions, however *bona fide*, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict (see *R v. McDonald*). Thus, it has long been recognized that witnesses should be asked to identify a suspect or an accused at the earliest opportunity and under the fairest of circumstances (see *R v. Cartwright* (1914) 10 Cr App Rep 219 (refd); *Davies v. The King* (1937) 57 CLR 170 (refd); *R v. Browne and Angus* (1951) 99 1 WWR 449).

[17] The observations above were made in the context of a jury trial. Jury trials have since been abolished but the duty to warn as to the dangers as prescribed above still remains and it now falls upon a trial judge sitting alone to administer the warning of the dangers involved to itself.

[18] The *Turnbull* guidelines were reformulated into a three step test by the Singapore Court of Appeal in the case of *Heng Aik Ren Thomas v. Public Prosecutor* [1998] 3 SLR 465 and referred to recently by the Federal Court in the case of *Duis Akim & Ors v. PP* [2013] 9 CLJ 692; [2014] 1 MLJ 49 in a passage that bears useful reproduction:

To begin it is in the forefront of our minds the *Turnbull* guidelines (*R v. Turnbull* [1976] 3 All ER 549) as succinctly summarised in the case of *Heng Aik Ren Thomas v. Public Prosecutor* [1998] 3 SLR(R) 142. Delivering judgment for the Singapore Court of Appeal M Karthigesu JA said this at paras 33-35 of the judgment:

> Although the *Turnbull* guidelines were drafted to assist a trial judge in correctly directing the jury, the principles which were enunciated in it are of equal relevance to our criminal trial system. In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into the following three-step test. The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.

If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence. Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there in any other evidence which goes to support the correctness of the identification. If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe. The supporting evidence need not be corroboration evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.

We agree with the summary of the guidelines.

[19] In *Yau Heng Fang v. PP* [1985] 2 CLJ 22; [1985] CLJ (Rep) 350; [1985] 2 MLJ 335 it was held:

> If the prosecution depends solely, as in the present case, upon visual identification by one or more witnesses, the Judge must withdraw the case from the jury if the evidence is of poor quality (see *R v. Turnbull* [1976] 3 All ER 549, 553). In our opinion, both from the poor opportunity for the eye-witnesses to recognize the appellant and their poor quality as identity witnesses, their testimony on the issue of identity must be held to be inherently incredible. In the absence of evidence to connect the

> appellant with the crime, which is an essential element in any criminal prosecution, no *prima facie* case could have been established by the prosecution and the appellant should therefore have been acquitted without his defence being called.

[20] This court is also acutely aware of the observations made in the case of *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65; [2003] 2 MLJ 241 where the Court of Appeal held at p. 70 (CLJ); p. 245 (MLJ):

> Now, the English case of *Turnbull* did not lay down any proposition of law embodied in concrete. As all members of the criminal bar are aware, the several propositions in *Turnbull* are known as the '*Turnbull* guidelines'. And that is what they really are. They are just guidelines and each case depends on its own facts. What was said in *Turnbull* does not amount to inflexible rules with no exceptions whatsoever.

[21] Similar sentiments were also expressed by the Federal Court in the case of *Erivesto Anderson & Anor v. PP* [2008] 6 CLJ 453; [2009] 1 MLJ 593. However, these views were expressed in the context of an assault launched upon the failure of the trial judge in those cases to expressly make reference to the *Turnbull* guidelines, but where the judge had nevertheless duly proceeded to consider the quality of identification evidence and the circumstances in which they were made. In any event, this court finds that the facts and circumstances of this case justifiably warranted the application of the *Turnbull* guidelines.

Was The Identification Of The Appellant Safe?

[22] Bearing all of the foregoing in mind, and reverting to the facts in this case, did the learned Sessions Court Judge err in accepting the evidence of PW2 on the identification of the appellant as the basis for calling for his defence? This court thinks that a convenient starting point for the consideration of the issue is to consider whether the learned Sessions Court Judge had addressed her mind to the quality of the identification evidence available. Although no particular form of words are needed, it must be shown that the trier of fact had in mind the nature and quality of the identification evidence. A perusal of the grounds of judgment would indicate that apart from the reference to the testimony of PW2 as to why he was clear and certain of his identification of the appellant as one of the robbers, the judgment failed to address the issue of the conditions under which such identification was made. There was also certainly absent from consideration the issue of whether the quality of identification was such as to necessitate a warning given to itself of the dangers of acting on such evidence.

[23] From the nature of the identification evidence given by PW2, it is clear that his identification was not made in the ideal of circumstances. For starters, the appellant, he said wore a full faced helmet complete with a 'rainbow visor'. Although it was not stated in evidence as to what exactly

A is a rainbow visor, it is clear that given ordinary and common human observation and experience, the surface of such visor would, first of all, necessarily reflect a certain amount of light of its surface and secondly, the tint being as it were, a rainbow tint, can only mean that there was also present a certain number of different colours reflecting off its surface. Although PW2 B disagreed with the suggestion under cross-examination that his view of the appellant was for a brief moment, given the circumstances prevailing at the time, such evidence can justifiably be called into question. PW2 testified that the role of the robber he identified as the appellant was only to usher him from the back of the store to the front. Given the ordinary course of events, C this would have taken no more than a few seconds to achieve. Any reasonable inference would conclude that the opportunity for observation of the appellant would inherently be brief.

[24] It is also the evidence of PW2 that he saw only a bit of the face 'saya lihat muka sedikit'. The reason why he was able to see the face was because D the helmet worn by the robber had apparently prevented the light shining from above from reflecting of the surface of the visor and into his eyes. It may be that PW2 was sure that he saw the face of the appellant, however, as laid down in *Turnbull*, even a mistaken witness can be a convincing one. The reasons given by the learned Sessions Court Judge for accepting the E testimony of PW2 was that he was an honest witness who did not manufacture or add on evidence, that he was confident of his identification of the appellant and adamant that he was one of the three robbers. This may well be true. The issue however, facing this court is whether or not the learned Sessions Court Judge in all the circumstances of the case had in mind the quality of the identification and the dangers of convicting based on such F evidence.

[25] It is not in dispute that the case against the appellant depends wholly or substantially on the correctness of the identification evidence that the appellant alleges to be mistaken. This is the first condition under which the *Turnbull* guidelines would assume significance according to the restatement G of the rules as espoused in the case of *Heng Aik Ren Thomas v. PP (supra)*.

[26] The second question would be, is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? This question would involve a list of non-exhaustive H list of factors such as the length of time the witness observed the accused, the distance at which the observation was made, the presence of any special reasons for the witness to remember the accused, and lapse of time between the original observation and the identification parade and so on. This court has read and re-read the grounds of judgment in order to find any presence I of a consideration of these factors and apart from the reproduction of PW2's testimony in court as to the reasons why he was able to identify the appellant as the robber, there is absent any consideration of the above factors from the

judgment. For example, it was nowhere mentioned the circumstances under which the identification was made, what length of time did PW2 have the opportunity to observe the face of the robber, was it but a fleeting glance?, what was the distance from which the observation was made?, and whether there were any impediments or obstruction to the view that PW2 had. Now, it may well be the case that PW2 was certain of his observation of the appellant. However, it was incumbent on the learned Sessions Court Judge to evaluate the quality of the identification given the circumstances in which they were made. This, she failed to do. If she had taken note of any specific weaknesses that may have existed in the identification evidence, for example, the fact that it was made through a 'rainbow visor' and that even though only a part of the face could be seen, she still was satisfied that the identification was safe to rely upon, her judgment may have been unassailable. However, this was not the case here. Had the learned Sessions Court Judge undertaken an analysis of the identification as just described, she could have then proceeded to safely assess the value of the identification evidence. But being as the case was here, that the quality or the circumstances under which the identification was made was poor, she should have gone on to consider the third of the questions referred to in *Heng Aik Ren Thomas (supra)* namely, whether there was other evidence which went to support the correctness of the identification. It must be remembered that the CCTV recording was corrupt and therefore of no assistance and the couple present at the store at the time of the incident had not been called to testify. Should she have been unable to find any other supporting evidence, she should have been mindful that a conviction that relied on such poor identification evidence would be unsafe.

[27] Unfortunately, there was nothing in the grounds of judgment to indicate that the learned Session Court Judge had any of these factors present in her mind when she proceeded to accept the identification evidence of PW2. This is more glaring in light of the fact that although PW1 was present at the scene (he was in fact the complainant), he was unable to positively identify the appellant. Identification is something that must be positively proved against an accused before it can be relied upon against him. Support for this can be found in the case of *KS Roberts v. PP* [1970] 1 LNS 44; [1970] 2 MLJ 137 which held:

> Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfills the definition of the word "proved" given in section 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but it would appear to me that in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is so

A highly probable that its truth can safely be accepted. The test excludes from its orbit blind faith of a true believer, because prudence and credulity do not go together.

[28] Under the circumstances of the case and the inherently difficult conditions under which the identification was made, this court is of the B considered view that the learned Sessions Court Judge had failed to warn herself of the dangers associated with accepting the identification evidence of PW2. This is so notwithstanding the fact that PW2 had identified the appellant in the identification parade held after the incident. The evidence of the identification parade or test identification as it is sometimes called, is C at best, supporting evidence. Although it can be used to corroborate the substantive evidence given by the witness in court, it has no independent value. It must be remembered that when the identification parade was conducted, the appellant was not wearing a helmet with a full face rainbow visor. The conditions were therefore less than ideal and not reflective of the actual circumstances under which PW2 had seen the robber in question. It D may well be that even under those conditions, PW2 was able to identify the appellant. However, that does not in any way detract from the fact that the quality of the identification evidence under the circumstances was inherently poor. In any event, as stated in *Jaafar Ali v. Public Prosecutor (supra)*, in the absence of such other evidence the fact that the accused was picked out at E an identification parade makes no difference.

Decision Of The Court

[29] As identification is an essential ingredient of the offence of robbery under s. 395 of the Penal Code read together with s. 397 of the same code, F the defence of the appellant ought not to have been called in the first place.

[30] This court therefore finds that given the poor quality of the identification evidence, should the learned Sessions Court Judge have conducted a maximum evaluation of the prosecution's case as required, she ought to have held that the prosecution had failed to establish a *prima facie* G case and so should have acquitted the appellant without calling upon him to make his defence. See the cases of *PP v. Dato' Seri Anwar Ibrahim* (No. 3) [1999] 2 CLJ 215; [1999] 2 MLJ 1, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 AMR 89, *Balachandran v. PP* [2005] 1 CLJ 85 and *PP v. Tan Sri Kasitah Gaddam* [2009] 1 LNS 741; [2009] 5 AMR 228.

H **[31]** Before concluding, one other matter needs consideration. It is this. Normally, a court hearing an appeal should be slow to overturn a trial judge's finding of fact, and here it is the finding that PW2 had satisfactorily identified the appellant. In the case of *Ye Wei Gen v. PP* [1999] 4 SLR 101, also a case in which identification was in issue, it was held as follows:

I It is trite law that an appellate court will be slow to overturn the trial judge's finding of fact unless it can be shown that his decision was plainly wrong or against the weight of the evidence before him: *Tan Chow Soo v.*

Ratna Ammal [1969] 2 MLJ 49, *Lim Ah Poh v. PP* [1992] 1 SLR 713, *Ng Kwee Seng v. PP* [1997] 3 SLR 205, *Yap Giau Beng Terence v. PP* [1998] 3 SLR 656 and *Syed Jafaralsadeg bin Abdul Kadir v. PP* [1998] 3 SLR 788. These cases thus stand for the principle that findings of fact by the trial judge are *prima facie* correct unless there are very good grounds for disturbing them.

[32] Guided by the principles espoused in the case above, this court nevertheless finds that on the facts, the learned Sessions Court Judge had failed to take into consideration the fact that the quality of the identification was such that she ought to have warned herself of the dangers of acting upon such evidence. She ought, under the circumstances, to have alluded to the guidelines as enunciated in *R v. Turnbull (supra)* in her judgment. This court is of the view that her failure to do so has resulted in the conviction against the appellant to be unsafe. Therefore this is a proper case warranting appellate interference. Accordingly, this court allows the appeal of the appellant and sets aside the conviction recorded against the appellant in the Sessions Court.